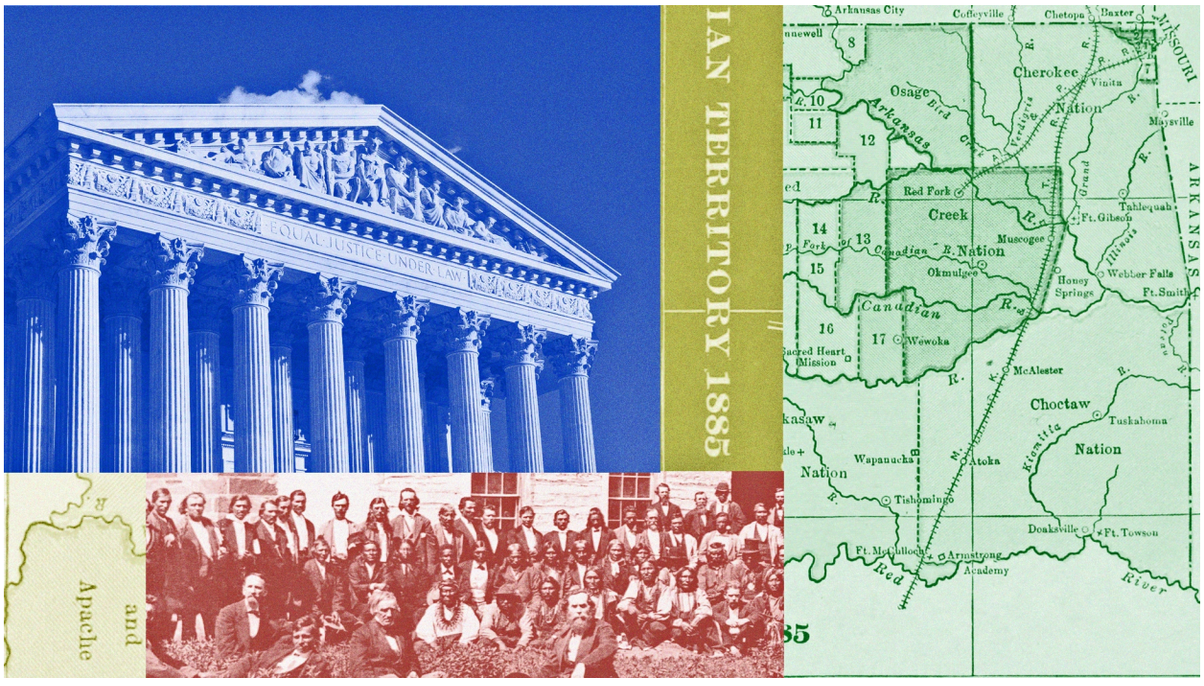
IDEAS

Where Is Oklahoma Getting Its Numbers From in Its Supreme Court Case?

The state seems to be exaggerating the upheaval caused by the *McGirt* decision two years ago.

By Rebecca Nagle and Allison Herrera



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About the authors: *Rebecca Nagle is a journalist based in Tahlequah, Oklahoma. Her podcast,* This Land*, won the American Mosaic Journalism Prize in 2020. Allison Herrera covers Indigenous affairs in Oklahoma for KOSU and Newsy.*

This week, the Supreme Court will hear oral arguments in *Oklahoma v. Castro-Huerta*, a case that is seeking to limit the scope of a decision the Court made less than two years ago. In July 2020, the Supreme Court ruled in *McGirt v. Oklahoma* that Congress never annulled the Muscogee Nation reservation. After the *McGirt* ruling, an additional five reservations in the state were affirmed by lower courts—meaning that more than 40 percent of Oklahoma is now legally Indian Country.

Oklahoma argues that the scope of *McGirt* should be reviewed because the decision caused "sweeping turmoil" and "pitched Oklahoma's criminal-justice system into a state of emergency." The case centers on Victor Manuel Castro-Huerta, a non-Native man who was sentenced to 35 years in prison for neglecting his Native American stepchild while living on the Cherokee Nation reservation. His conviction was overturned by Oklahoma's highest criminal-appeals court after he argued that the state lacked jurisdiction over his case. (He has already pleaded guilty to federal charges.) Oklahoma then appealed the case to the Supreme Court, reasoning that the state should retain jurisdiction over Castro-Huerta and all other non-Native defendants in crimes with Native victims.

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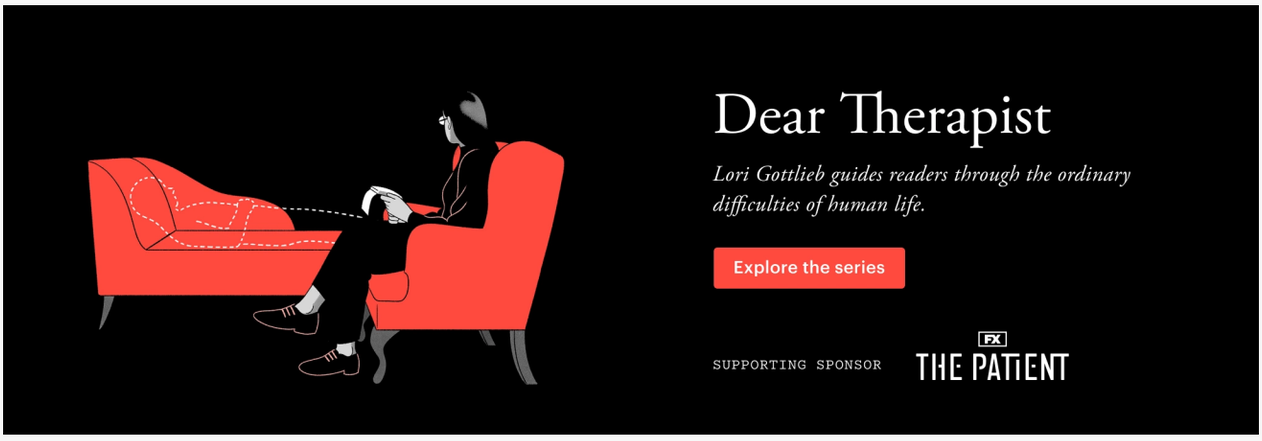

To prove that *McGirt* wreaked havoc in Oklahoma, the state is claiming that it has lost jurisdiction over 18,000 prosecutions a year, many of which are now "going un-investigated and unprosecuted, endangering public safety."

The problem is that this number seems to have come out of nowhere; Oklahoma doesn't provide any source for it. Over the past several months, we tried to verify Oklahoma's claim by filing information requests and collecting data from the governor's office, the office of the attorney general, various district attorneys, the Oklahoma Department of Corrections, tribes, and the federal judiciary. We found that Oklahoma's claims did not hold up to scrutiny.

Despite this, there is reason to worry that Oklahoma's dubious numbers could still convince a majority of the Court. *McGirt* was decided by a slim 5–4 majority, and since then, the makeup of the Court has shifted. In his 2020 dissent, Chief Justice John Roberts largely agreed with Oklahoma's claims that upholding tribal land and treaty rights in Oklahoma would lead to chaos. If five justices side with Oklahoma in *Castro-Huerta*, they could rewrite state jurisdiction on more than 300 reservations in the United States, changing how crimes are prosecuted on tribal land, not just in Oklahoma.

Such a consequential decision should be based on information that has been publicly verified. Instead, Oklahoma is asking the Supreme Court to issue a decision based on speculation at best—and inaccurate and misleading information at worst.

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When we asked the attorney general's office where the 18,000 estimate came from, a spokesperson told us that "due to active litigation, our office cannot disclose that information at this time." But the state seems to expect that, even without a public source, the Supreme Court will rely on this number.

The Court should proceed with caution. According to data collected from the Tulsa district attorney and the Oklahoma District Attorneys Council, the total number of criminal cases filed in eastern Oklahoma (where *McGirt* is relevant) fell by 13,131 from 2019 to 2021—the years that the reservations of the six tribes were affirmed. A significant number, but less than 18,000. (It should be noted: These are the same years that the coronavirus pandemic reduced the number of arrests and prosecutions in Oklahoma and affected rates across the country.)

To see if there was a gap in criminal prosecutions—the state also claims that tribal and federal efforts to take over cases were "woefully insufficient" and left an "alarming gap" of a suggested 10,000 cases—we compared the decrease in state cases filed with the number of federal and tribal cases filed. Since their various reservations were affirmed, the tribes have filed more than 11,400 felony and misdemeanor criminal cases, and U.S. attorneys have filed nearly 1,000 cases in federal court in 2021. Taken together, that leaves a gap of fewer than 1,000 cases, and some of that may be more the result of the pandemic than any problem specific to Oklahoma and the reservations.

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This isn't the first time Oklahoma has provided the Supreme Court with numbers and estimates that lack a public source. In the years that Oklahoma has litigated the reservation issue in front of the Court, its estimates of how many past convictions could be affected have increased from "hundreds, if not thousands" in 2018 to "over 3,000" in 2020 to "at least 76,000" in its petition to the Court to take the *Castro-Huerta* case last fall, a number widely cited in media coverage at the time. But eventually, courts decided that *McGirt* would not apply to past convictions, and the state has stopped using the 76,000 estimate.

When we initially asked the governor's office how it came up with that number, its communications director, Carly Atchison, told us that the 76,000 estimate, while now moot, represents all cases that could have been affected by *McGirt* from January 2005 to April 2021. However, "as far as methodology goes, you'd need to ask the district attorneys. Our office was presented with the estimate, we did not help to compile it," she wrote to us in an email. In a follow-up, she again distanced the office from the 76,000 number, but she still could not provide any transparency about how the governor's office may have arrived at that figure in the first place.

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Both the governor's office and Oklahoma's petition claimed the estimate came from district attorneys, but no district attorneys we spoke with knew what the governor's office was talking about. "To my knowledge, we have made no such communication to the governor's office, nor has one been requested," Tim Webster, the district attorney for Atoka, Bryan, and Coal Counties, told *The Atlantic*. Steve Kunzweiler, the DA for Tulsa—eastern Oklahoma's most populous county—told us he did not supply the governor's estimate. The attorney general's office and the law firm Paul, Weiss, which filed the petition, did not respond to *The Atlantic*'s request for comment.

The most accurate way to know how many prosecutions were affected by *McGirt* would be to simply count. After spending months filing requests for data with local district attorneys, we found that *McGirt* cases are being tracked inconsistently among Oklahoma prosecutors and in some places not at all. The state of Oklahoma funds and administers the criminal-justice agencies that are best equipped to collect data on the impact of *McGirt*. There is no reason that the public debate should still be based on estimates with secret sources, instead of real and publicly available numbers.

According to data provided by the Oklahoma Department of Corrections, we found that in the 18 months following the *McGirt* ruling, 68 people were released from Oklahoma's custody to the street because of the decision. An additional 123 people were released to tribal or federal custody, 13 people successfully overturned one of their convictions but remain incarcerated by Oklahoma on other charges, and four defendants were already on probation at the time they won their appeal.

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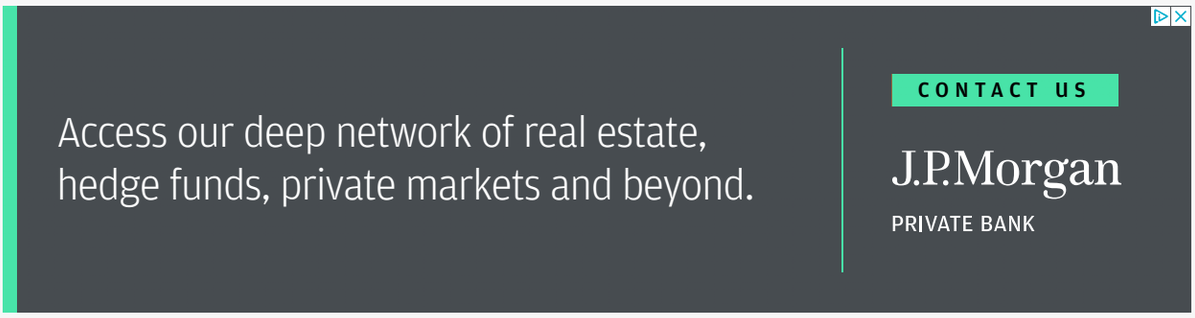

After months of litigation, Oklahoma courts eventually ruled that *McGirt* does not apply to old convictions. As a result, the actual number of Oklahoma inmates who have obtained relief based on *McGirt* is going down, not up. Of the 68 defendants released to the street, four have been returned to custody, eight more have had their order granting post-conviction relief revoked by an Oklahoma court, and in another 23 cases, district attorneys have filed motions asking the court to vacate its order granting the defendant relief. That leaves 33 Oklahoma defendants who—so far—have gotten off free and clear.

That's not to say the *McGirt* decision had no impact. It was a considerable shift in criminal jurisdiction in eastern Oklahoma. When we spoke with Oklahoma prosecutors, they described the transition in criminal jurisdiction as tumultuous. "*Chaotic* is the best word to describe the environment that followed *McGirt*," Kunzweiler, the Tulsa district attorney, told us.

But tribal leaders told us that though the transition was a huge logistical hurdle, the level of chaos was greatly influenced by the level of cooperation they received from local prosecutors and law enforcement. In some counties, local DAs and the tribes worked together to make sure that cases didn't slip through the cracks. According to the Seminole Nation prosecuting attorney Timothy Brown, before the reservation was affirmed in April 2021, the local assistant DA sent the tribe a list of defendants who could be released from jail or state prosecution. Brown took that list and filed charges in the Seminole Nation's court. In other districts, there was little or no coordination. Cherokee Nation Attorney General Sara Hill told us that in some counties within their reservations, "the elected district attorneys were so hostile to tribal jurisdiction that there was essentially zero communication … Cherokee Nation's assistant attorney generals would literally sit through state-court criminal dockets … to identify cases that involved an Indian defendant."

The tribes, for their part, have increased the capacity of their criminal-justice systems; they've filed thousands of cases, hired more prosecutors, and received federal funds to hire victim advocates and special prosecutors.

The Muscogee Nation, the tribe at the center of the 2020 Supreme Court decision, has hired nine criminal investigators to its Lighthorse Police Department, 20 more police officers, five new prosecutors, seven new legal support staff, and one new criminal investigator within the Muscogee Nation attorney general's office. Since July 9, 2020, Muscogee Nation officials have made 1,622 arrests and filed 3,932 criminal cases. To date, Muscogee Nation has 63 cross-deputization agreements in place; this allows both state and tribal police to stop, arrest, and detain people no matter the Native status of the suspect or victim. Some tribes, such as the Chickasaw Nation, have even hired special assistant United States attorneys, who can prosecute cases in both tribal and federal courts, to help with the increased federal caseload. The Cherokee Nation alone committed nearly $30 million of its 2021–22 budget to criminal justice on its reservation—a historic amount. Of the eight new prosecutors that the Cherokee Nation has hired, four of them previously worked for Oklahoma district attorneys. Because tribal and federal prosecutors have higher salaries than Oklahoma prosecutors, Oklahoma DAs are losing staff and now facing shortages, according to Kunzweiler.

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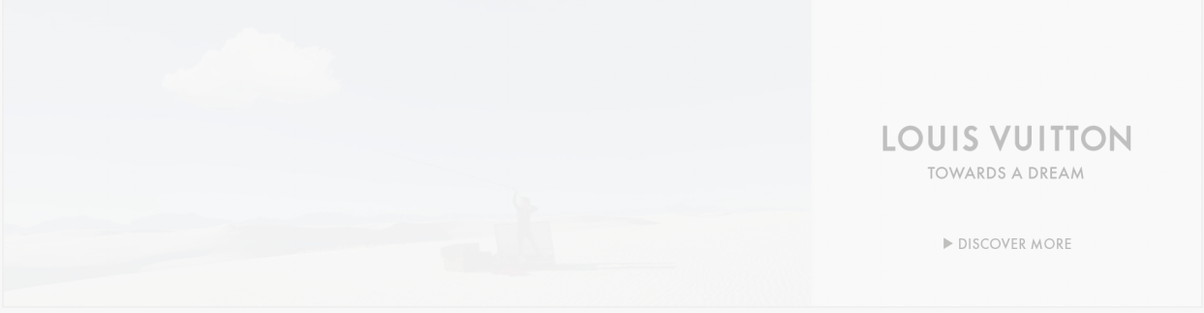

It is the constitutional role of Congress, not the Supreme Court, to change who has criminal jurisdiction on a reservation. Oklahoma started petitioning the Court to review the *McGirt* decision only after its attempts at congressional legislation to narrow the scope of the decision failed. Congress has acted, however. The most recent congressional spending bill allocated more than $62 million to help with the costs of increased tribal criminal jurisdiction. And the recent reauthorization of the Violence Against Women Act expanded tribal jurisdiction over non-Native perpetrators for certain violent crimes.

In the *McGirt* case, Oklahoma invited the Supreme Court to make a decision based on fear and speculation rather than the law. Justice Neil Gorsuch and a majority of the Court rejected that invitation, noting that the disarray Oklahoma warned about wasn't relevant to their judicial review. Two years later, we can now see that the state's claims were exaggerated. But the role of the Court to interpret—not create—law hasn't changed.

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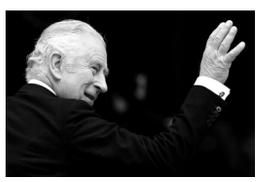

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